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Montana Water Court

November 22, 2004

Judge Bruce Loble
Montana Water Court
PO Box 1389
Bozeman, MT 59771

Hand Delivered.

RE: Proposed Water Court Rules
Our file no: 66041-2004

Dear Judge Loble:

I have finally taken time to review the proposed draft Water Court Rules, with particular attention given to Rule 1.II.(7) (8) and (9). In addition, I re-reviewed your letter of September 16, 2004 to Senator McNutt and his letter to you also dated September 16, 2004.

First, let me say that I am pleased that rules addressing the Court's procedures, particularly for issue remarks and calling claims in on the Court's own motion are being proposed. I have thought for years that it was critical that all claimants know when, why and how the Court conducts matters in this regard. While I am also pleased to see that Rule 1.II (10) seems to make calling claims in on the court's motion and dealing with issue remarks discretionary with use of the word "may" I am concerned about a couple of things.

Rule 1.II. (9) states "If not otherwise resolved by the objection process, all issue remarks ... shall be addressed by the water court." This rule does not say *how* the issue remarks are to be resolved. I do not believe it should be mandatory for the Court to go through an in depth process to address the issue remarks on all claims.

It is entirely appropriate for the Court, within its discretion, to simply dismiss and remove an issue remark prior to issuance of a Final

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Decree. In other claims, it may be necessary for the Court, within its discretion, to implement an additional process as set forth in Rule 1.II. (10). My suggestion is to make it clear in these rules that the Court has discretion to either dismiss and remove the issue remarks, or to proceed under section (10).

In regard to the claims where the Court finds it necessary to implement the additional process, my suggestion is that the rules should include some guidelines and criteria which it will use to decide if it will review a claim under sections (7) (8) or (9). Having some guidelines and criteria will insure that all claimants, regardless of what basin or what water master they may have, will be afforded some degree of consistency.

Finally, if the Court reviews a claim on an issue remark, what will it require to resolve the issue remark in terms of evidence or testimony? Is it presumed the issue remark overcomes the *prima facie* status of the claim? If so, based on what? I would find it very objectionable if an issue remark did over come the *prima facie* status of the claim, as the issue remark is not likely based on any personal knowledge, it is not known who can substantiate the issue remark, and the person appending the issue remark has not necessarily been qualified as an expert witness in order to further substantiate the "evidence" of the issue remark.

Again, having something in the rules which provides guidance in this regard would better afford all claimants equal protection and help to eliminate or at least reduce the possibility of different applications and procedures between the various water masters and between the various basins.

On issue remarks which are purely factual, i.e. acres irrigated, point of diversion etc., my suggestion is the rules explicitly state that the issue remark **does not** overcome the *prima facie* status of the claim. Rather, if the Court proceeds under Section (10), there shall be some kind of evidence and testimony provided by DNRC personnel, or someone, to overcome the *prima facie* status of the claim.

If an issue remark involves a legal issue, such as *res judicata* in a decree exceeded situation, then the Court should, as it has, continue to address the remark and resolve it by requiring chain of title information from the claimants.

A comment on the September 16 letters: As the chief sponsor of HB 407 in the 1999 Legislature, I would re-iterate that I absolutely did not

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intend for the final result to be a mandatory on motion policy requiring the Water Court to exhaustively address all issue remarks through a hearing and/or additional evidence or testimony. My intent was to require some kind of rules so that **all** claimants, regardless of what basin their claims were in, would know under what circumstances their claims may be called in on motion by the Water Court. The inconsistencies between basins and certified claims was very troublesome as some claimants with issue remarks were being taken to task while others were not addressed at all.

As you can probably guess, it would have been then, and is still my preference that the Court does NOT address issue remarks on its own motion, other than on the purely legal issues such as decree exceeded situations. I still have great reservations as to the Court's ability to be the impartial arbiter while prosecuting the claim if this is to be a judicial adjudication. Perhaps, if the adjudication had originally been set up as an administrative process, the hearing officer could act on behalf of the public interest. But, clearly that is not what was contemplated in 1973.

However, if there is to be "on motion" activity by the Court, then it is only fair, for the reasons stated above, for there to be clearly stated rules, guidelines and criteria outlining the process by which the Court will do so, insuring everyone equal protection and notice.

Please let me know if you have any questions or would like to discuss this matter further.

Sincerely,



CINDY E. YOUNKIN

cey

cc: Senator McNutt, EQC Chairman
CEY1276.WPD

cc: Krista Evans -EQC